

KENNETH MEDENBACH SWIS#794840
MCDC
11540 NE Inverness Drive
Portland, OR 97220
Phone: (503) 699-7333
FAX: (503) 345-9372
e-mail: mattschindler@comcast.net

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**UNITED STATES OF AMERICA,
Plaintiff,**

Case No. 3:16-CR-00051-BR

vs.

**MOTION TO RECONSIDER
ORAL MOTION TO DISMISS**

**KENNETH MEDENBACH,
Defendant(s).**

Pro se defendant, Kenneth Medenbach, moves the Court to reconsider its order rejecting defendant's Motion to Dismiss. ECF 298. The defendant requests oral argument.

A. Status of the Case:

The defendant is a political prisoner serving a sentence despite not having been convicted of any crime. He was an unarmed participant in a constitutionally protected protest at a property about which there was a good faith dispute concerning ownership. He was arrested picking up groceries in a vehicle that he believed belonged to the people of Harney County based on his understanding of the law. Defendant has requested a speedy trial and anticipates that the court will provide one.

B. Reasons to Reconsider:

In its rulings on defendant's oral motion, this court misconstrued the thrust of defendant's argument which had been twisted through the government's grandiloquence and the defendant's own inexperience in advancing such a motion.

In 1997, in an appeal from a conviction in U.S. District Court for the Western District of Washington, defendant challenged the constitutionality of federal ownership of public lands in Washington State. *United States v. Medenbach*, 116 F.3d 487 (9th Cir. 1997). Defendant also argued that since the Constitution does not confer upon federal courts the power of judicial review *Marbury v. Madison*, 5 U.S. 137 (1803), was wrongly decided. *United States v. Medenbach*, 116 F.3d 487 (9th Cir. 1997). The Ninth Circuit Court of Appeals rejected the argument because defendant failed to offer reasoning or case law to support the argument that *Marbury v. Madison* should be overruled. *Id.*

What follows is reasoning and proof that *Marbury v. Madison* must be overruled.

1. Congress has required an official oath that is inconsistent with the Constitution.

Article VI, Sec. 2 of the United States Constitution states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

The Constitution is the "Supreme Law" of the land. In order to support a true union by the people and for the people and to assure that the Constitution remained

the Supreme Law of the land, the drafters included in that very document the requirement of an oath before serving the country in an official capacity:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to 'support this Constitution' but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Article VI, Sec. 3 of the United States Constitution

These words, inserted when the whole frame of government, with the powers specified, had been adopted by the Constitutional Convention; and it was in that form, and with these powers, that the Constitution was submitted to the We the People, of the several States, for their consideration and decision. The emphatic language of the pledge required is to "support" this Constitution. There is no power more clearly enumerated by the plain language of the Constitution of the United States than this requirement for officials to "support" the Constitution.

The first law statute of the United States of America, enacted in the first session of the First Congress on 1 June 1789, was Statute 1, Chapter 1: an act to regulate the time and manner of administering certain oaths, which established the oath required by civil and military officials to, "support the Constitution." The first oath prescribed by Congress (June 1, 1789) was simply, "I do solemnly swear (or affirm) that I will "support the Constitution of the United States."

It took just one week short of four months before Congress to started perverting the Constitution. In the Judiciary Act adopted September 24, 1789, Congress prescribed an unconstitutional second oath of office to United States judicial officers:

“I, _____, do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me according to the best of my abilities understanding, agreeably to the Constitution and the laws of the United States. So help me God.”

See Judiciary Act of 1789, 1Stat. 73, Sec.8.

What this court did not previously consider, and what defendant failed to articulate at the motion hearing, was that this unconstitutional oath of “understanding, agreeably”, was central to the Supreme Court’s holding reserving to it the power to interpret the constitution in *Marbury v Madison*, 5 U.S.137 (1803). The Supreme Court said, "Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime".

If the unconstitutional second oath of office of "understanding, agreeably to the Constitution," had not been established by the Judiciary Act of 1789, 1Stat. 73, Sec.8, it would never have been available to the Supreme Court in 1803 and *Marbury v Madison* would have never come into existence. According to *Marbury v. Madison*, the oath by its very nature requires the power of Constitutional interpretation. Because that oath was not consistent with the Constitution in the first place, *Marbury* was wrongly decided.

2. Congress’s attempts to establish an oath have been inconsistent with the Constitution.

In the 1990 Judicial Improvements Act, at 28 USC § 453, Congress replaced the phrase, "according to the best of my abilities and understanding, agreeably to

the Constitution and laws of the United States. So help me God," to "under the Constitution." This begs the question of why the oath was changed after nearly 200 years and replaced with another oath no more consistent with the Constitution than the one it replaced.

The legislative history on this statute and its intent is opaque. The Congressional Research Service of the Library of Congress, which works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate, prepares upon enactment into law, a final public law summary. It stated concerning this provision:

Upon the enactment of replacing "according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God," with "under the Constitution," the Congressional Research Service stated, "This language proved reasonably more effective in tying the decisions of the judiciary to the authority of the United States Constitution."

It appears that Congress intended to force the judiciary to tie its decisions to the Constitution with a revised oath that eliminated the language allowing the courts to extend their authority in an unconstitutional manner. It also suggests that because actions were taken by the courts in an extra-constitutional manner pursuant to an invalid oath, decisions made by the federal courts prior to 1990 are presumptively unconstitutional.

At the same time, since the 1990 Judicial Improvements Act did not cure the unconstitutional flaws in the oath which remains inconsistent with the plain language of the Constitution:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States,

shall be bound by Oath or Affirmation, to "support" this Constitution..."

Art. VI, Sec. 3 United States Constitution

The plain language of the Constitution dictates that an oath with the language "under the Constitution," is no closer to the correct Constitutional oath to "support the Constitution," than "understanding, agreeably" to the Constitution.

3. The federal court's flawed understanding of the unconstitutionality of the oath and its impact are apparent from the course of defendant's history in the federal courts.

In *United States of America v Medenbach*, the Ninth Circuit stated:

"Medenbach argues that the district court judge's oath of office was constitutionally deficient because the statutorily prescribed oath of office set out at 28 U.S.C. § 453 does not mirror the wording of the Constitution itself. The Constitution requires that, "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath of Affirmation, to support this Constitution." (U.S. Const. art.VI, cl. 3). The oath prescribed by statute requires that each federal justice or judge swear to "faithfully and impartially discharge and perform all the duties incumbent upon me ... under the Constitution and laws of the United States." 28 U.S.C. § 453. Medenbach argues that the district court judge who presided over Medenbach's bench trial lacked judicial authority because he did not swear to "support" the Constitution, only to perform his duties "under" the Constitution. The Constitution does not require that a judge swear verbatim to "support" the Constitution. Thus, we reject Medenbach's claim that the district court judge's oath of office was deficient."

United States v. Medenbach, 116 F.3d 487 (9th Cir. 1997)

The Ninth Circuit's holding that a judge need not swear verbatim to "support the Constitution" is plainly inconsistent with the language of the Constitution.

Because defendant did not have the opportunity for oral argument before the Ninth Circuit, he was never afforded the opportunity to make this argument to that Court.

4. Defendant's literal reading of the oath is supported by *Marbury*.

In *Marbury v Madison*, the Supreme Court considered the limited grant of judicial power *expressly* found in the language of the document as key to understanding its provisions:

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

Marbury v. Madison, 5 U.S. 137, 174, 2 L. Ed. 60 (1803)

If it cannot be presumed that any clause in the Constitution is intended to be without effect, neither the Congress nor the federal courts have the power to ignore the language of the Constitution requiring a specific oath.

For the same reason, the Court was wrong in *Medenbach v United States of America* Case No. 1:14-cv-641-PA when Judge Panner states, "Plaintiff s claim is wholly insubstantial because the slight difference in wording between the Constitution and the statute providing the oath of office has no legal significance." Nowhere does the Constitution expressly vest in Judge Panner the right to decide that the plain words of the Constitution have no effect. Furthermore, the implication from his holding is that everyone in government has the right to interpret or in this case, disregard, the Constitution.

5. Marbury is inconsistent with the language of the Constitution and the right to interpret the Constitution belongs to the people.

The plain language of the Constitution allows and requires only one oath of office to "support the Constitution." Any other oath of office for United States justices and judges, that does not have "support the Constitution" in it, prescribed by Congress and taken by federal judicial officers does not meet the requirements of Article VI, Sec. 3 and the 10th Amendment.

The 10th Amendment, which is never mentioned in *Marbury v Madison*, states; "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *Marbury v Madison* the Supreme Court, unconstitutionally, delegated to itself the power to interpret the Constitution when it stated; "It is emphatically the province and duty of the judicial department to say what the law is,..." Judicial interpretation of the Constitution is not a power expressly delegated to the judiciary. It was a power unlawfully taken from the people without Constitutional authority in violation of the 10th Amendment. *Marbury v Madison*, as well as *United States v. Medenbach* were wrongly decided. This United States District Court lacks jurisdiction to decide this case because the Constitution's plain language does not confer upon federal courts the power of judicial review. See U.S. Const. Art. VI, cl. 3.

Since all state officers also take an unconstitutional oath they are prohibited by the 10th Amendment from interpreting the Constitution. Thus the powers quoted in *Marbury v Madison*, are reserved to "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, who ordained and established this Constitution for the United States of America."

6. The Court and government misunderstood defendant's argument.

On March 11, 2016 the court rejected defendant's argument that a second oath required by Congress is unconstitutional. It did so, in part, because of the government's mischaracterization of the arguments that defendant has raised previously and federal court. The core of defendant's argument in those cases went to the actual language of the oath's of office as opposed to a second unconstitutional oath as required by 5 USC § 3331.

During the hearing the Court stated:

“Sir, I took the oath, a single oath that's on record....It's not necessary for me to make this point, but I feel I want to communicate to you as an individual. I have in fact, throughout my judicial career, tried every time I had to make a ruling to follow the oath I took -- both as a judge of the circuit court of the state of Oregon and then beginning in 1999, for this court -- to support and defend the Constitution of the United States. *Exhibit 1* at 31.

In reviewing the United States Code, it appears that two different statutes require an oath of office, 5 USC § 3331 and the unconstitutional second oath found at 28 USC § 453. The court not address this argument, nor has any other court in contrast to the government's mischaracterization.

C. Conclusion:

For the reasons stated above the defendant's Motion to Dismiss should be reconsidered and he should be granted oral argument.

Respectfully submitted on April 4, 2016.

Kenneth Medenbach
Pro Se Defendant.